



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 24, 2004

Mr. Joe A. De Los Santos
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San Antonio, Texas 78246-0606

OR2004-1360

Dear Mr. De Los Santos:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 196603.

The Stockdale Independent School District (the "district"), which you represent, received a request for information concerning an investigation of the requestor's client, a district employee, and for the personnel file of the requestor's client. You indicate that some responsive information has been released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to records of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to

the allegations, and conclusions of the board of inquiry that conducted the investigation. *Id.* at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Thus, when there is an adequate summary of the investigation, the summary must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, the documents pertaining to the investigation are not excepted from disclosure, but the identities of witnesses and complainants are protected by common-law privacy.

The submitted documents include witness statements from a sexual harassment investigation conducted by the district. We find that the submitted documents do not contain an adequate summary of the investigation at issue. We therefore determine that pursuant to *Ellen*, the identities of witnesses in the investigation are protected by common-law privacy and must be withheld from disclosure under section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525. We have marked the information that the district must withhold pursuant to *Ellen* and common-law privacy.

Section 552.101 also encompasses information made confidential by other statutes. The district seeks to withhold one of the remaining documents under section 21.355 of the Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* You inform us that the individual at issue is a certified teacher.

The document you seek to withhold under this provision is a letter of reprimand and is not the type of record made confidential by section 21.355 of the Education Code. You argue that the Commissioner of Education has ruled that reprimands are evaluations for the purposes of section 21.355. *Tave v. Dallas Indep. Sch. Dist.*, Dkt. No. 067-R2-501 (Comm's Educ. 2001). However, we disagree with the Commissioner's ruling in *Tave*. Thus, we find that the submitted letter of reprimand is not confidential under section 21.355 and is not excepted from disclosure under section 552.101 on that basis.

You also seek to withhold the letter of reprimand pursuant to section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652

S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. *See Industrial Found.*, 540 S.W.2d 668. The letter of reprimand constitutes a record of the conduct and job performance of a public employee and, as such, it is subject to a legitimate public interest. Accordingly, the letter of reprimand is not protected by common-law privacy and is not excepted from disclosure pursuant to section 552.101 or 552.102 of the Government Code. *See Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of public employee's resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under constitutional or common-law right of privacy); see also Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).*

You contend that portions of the remaining information are excepted from disclosure under section 552.107(1) of the Government Code as information protected by the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). Thus, an attorney involved in a communication must be acting in the capacity of professional legal counsel.¹ Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives.² TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). A governmental body

¹ Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney).

² Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client's lawyer or a representative of the lawyer; between the lawyer and the lawyer's representative; by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer.”)

seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets the definition of a confidential communication depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) of the Government Code generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). We find that you have demonstrated that a portion of the information you seek to withhold under section 552.107(1) constitutes or documents confidential attorney-client communications. We have marked the information that the district may withhold under section 552.107(1). However, the remaining information at issue does not constitute or document privileged communications and is not excepted from disclosure pursuant to the attorney-client privilege.

Finally, we note that portions of the remaining information may be excepted from disclosure under section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely elect to keep this information confidential pursuant to section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is received. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who elected to keep information confidential pursuant to section 552.024 prior to the date on which the request for this information was received. We have marked the information in the submitted documents that may be excepted under section 552.117(a)(1). Provided the employees at issue timely elected to keep this information confidential, the district must withhold the marked information under section 552.117(a)(1). In the event the employees did not make a timely election, however, the marked information may not be withheld under section 552.117(a)(1). Furthermore, we note that the submitted documents contain information within the scope of section 552.117(a)(1) that relates to the requestor’s client. As the requestor has a special right of access to this information, we find that information relating to the requestor’s client is not excepted from disclosure under section 552.117(a)(1) in this instance. *See Gov’t Code § 552.023* (person’s authorized representative has special right of access to information that

is excepted from public disclosure under laws intended to protect person's privacy interest as subject of the information).

In summary, we have marked the portions of the submitted information that are protected by common-law privacy and must be withheld pursuant to section 552.101 of the Government Code.³ We have also marked the information that the district may withhold under section 552.107 of the Government Code as information protected by the attorney-client privilege. Provided the employees at issue timely elected to keep the information confidential, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. Otherwise, this information must be released. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

³ Based on this finding, we do not reach your argument under section 552.135 of the Government Code for portions of the information at issue.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 196603

Enc: Submitted documents

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